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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

PURNELL M. MILNER,
Attorney for Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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SUPREME COURT OF THE UNITED STATES

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No.

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION
FOR REVIEW ON A WRIT OF CERTIORARI OF A DECISION OF THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of the Continental Casualty Company brings this its application for Review by Writ of Certiorari of a Decision of the United States Circuit Court of Appeals, Fifth Circuit, in the above entitled cause, and with respect shows:

1.

That this is a case of a Surety on the Bond of a Government Contractor, under the Heard Act, ready and

willing and anxious to comply with its obligation to the United States, because when called upon to complete the contract according to its terms, agreed to do so by letter to the Administrative officer, March 28, 1934, as acknowledged by him April 3, 1934, and only refused to complete the work when the Administrative officer violated the agreement by refusing to make monthly progress payments according to the contract, having complied fully with its other obligations to laborers, subcontractors, and material furnishers by having paid in full, as shown by the Record 43-44-45-46, $37,470.61 to said laborers and material furnishers, the Surety being prevented from completing the defaulted contract for the United States after same was awarded to it, by the wrongful action of the Administrative officer, Lt. Col. J. N. Hodges, refusing to comply with the terms of the contract by making monthly progress payments, required by Art. 16 of the contract, under the following circumstances:

1.

The Grasser Contracting Co., on Nov. 17, 1932, as Principal, with the Continental Casualty Company as Surety, under $155,400 Bond, entered into contract with the United States of America for the construction of six items of Levees, handling 3,585,000 cubic yards of earth.

2.

Grasser Contracting Co. went into bankruptcy March 16, 1934, leaving 1,002,000 cubic yards to be done.

3.

Art. IX of the contract provided for such default as follows:

> "Article 9—Delays—Damages. If the Contractor refuses or fails to prosecute the work or any

separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. *In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise,* and the Contractor and *his sureties shall be liable* to the Government for *any excess cost occasioned* the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor."

4.

Petitioner shows that the United States did not avail itself of its options as expressed in Article IX, of either completing the work itself or by sub-contract, in which event the Surety's liability would have been fixed, but by way of minimizing damages, Lt. Col. J. N. Hodges, Administrative officer, on March 17, 1934, notified the Continental Casualty Company of the bankruptcy and default of the Grasser Contracting Co. and said "It is essential that the work be now completed at the earliest practicable date. You are therefore requested to state whether or not you, as Surety, desire to complete the work in accordance with the terms of the Contract". (R. 60).

5.

Art. 16 of the contract provided for monthly progress payments, which had been paid by the United States to the Grasser Contracting Co. under this Article under the contract.

6.

The Continental Casualty Company, by telegram and letter dated March 22, 1934, notified Lt. Col. Hodges "it desired to complete the contract in accordance with the terms of the contract and will proceed at the earliest possible time providing all necessary legal steps have been taken by the Government to cancel and annul the Grasser contract. We are confirming by letter".

7.

March 26, 1934, Lt. Col. Hodges notified Continental Casualty Co. that he *now* enclosed copy of "notice terminating contractor's right to proceed" (R. 63-64) and said: "It is the view of this office that this constitutes the only action necessary in the premises".

8.

March 28, 1934, by letter Continental Casualty Co. *accepted* this statement as constituting only action required of the Government, but suggested that that notice *be served* on Trustee in Bankruptcy (R. 64-65), which suggestion Lt. Col. Hodges complied with March 31, 1934 (R. 65-66), saying: "(d) The Continental Casualty Company, by telegram and letter confirmation, both dated March 22, 1934, signified its desire to complete the work in accordance with the terms of the contract and stated that it would proceed at the earliest possible time provided all necessary legal steps had been or would be taken by the Government to cancel or annul the contract with the Grasser Contracting Company", and, "(e) The Continental Casualty Company, by letter dated March 26, 1934, was informed that the action taken by this office on March 17, 1934, wherein the

contractor was officially placed in default and its right to proceed with the work remaining to be done under the contract was terminated, was considered to be the only action necessary in the premises".

9.

April 3, 1934, in letter to P. M. Milner (R. 68), Lt. Col. J. N. Hodges said "the Continental Casualty Company *has signified its intention to complete the work in accordance with the terms of the contract*".

10.

Petitioner shows that this case involves no disputed fact, as found by the United States Circuit Court of Appeals, Fifth Circuit, and because as shown by the Stipulation (R. 52) of the Attorneys (R. 52-53-54-55-56-57) the case was to be tried *on these facts*, and particularly because the United States attorney corrected his wrongful allegation, Art. XI of the petition (R. 6) by Art. 9 of Stipulation, by which, to correct same, he agreed to *offer*, *produce* and *file* the letters above referred to.

11.

Petitioner respectfully shows that these letters evidence a binding, legal contract between the United States and the Continental Casualty Co. for the latter to complete the work for 8 cents a cubic yard (price of original contract), subject to monthly progress payments, known in Louisiana Law, Civil Code Art. 1768, as a commutative contract in which "what is done, given or promised by one party, is equivalent to, or a consideration of what is done, given or promised by the other".

12.

Petitioner shows that while it was proceeding to organize the work to complete the contract, Lt. Col. J. N. Hodges, on April 3, 1934, notified P. M. Milner, representing the Continental Casualty Co., that although the terms of the contract just entered into contemplated monthly progress payments, the United States would not make them. (R. 15-16).

13.

Petitioner shows that its attorney, P. M. Milner, notified Lt. Col. J. N. Hodges that it was entitled to partial estimates by Article 16 of the contract, and would not accept this change in the contract terms.

14.

Point 1.

Point 2.

Petitioner shows that the Court of Appeals erred when it held that the letters quoted herein, although by the Stipulation signed by the United States attorney and petitioner's attorney the case was to be decided on the facts evidenced by these letters (R. 52, and particularly page 54, Art. 9), *did not* evidence a meeting of minds, which petitioner assigns as palpable error of law, hence the Surety by this agreement, so says the Court of Appeals, had acquired no rights that could be violated.

And Point 2, that the Court of Appeals erred, as a matter of law, when it held that conceding a contract existed, the action of Lt. Col. J. N. Hodges did not bind the United States because the action was wrongful.

Petitioner shows, as will be pointed out in supporting brief, that the jurisprudence of this Honorable Court is that where the grantee prevents performance, the grantor is excused from performing.

Petitioner shows that, indisputably, by the letters of Lt. Col. J. N. Hodges, Administrative officer, and of the Continental Casualty Co. from March 17, 1934, inclusive of March 28, 1934, as acknowledged by Lt. Col. Hodges to the Trustee in Bankruptcy, March 31, and to P. M. Milner, April 3, there was a meeting of minds and a contract between the United States and the Continental Casualty Co., by which the Continental Casualty Co. agreed to complete the work for 8 cents a cubic yard, with monthly progress payments. These decisions are "*United States v. United Engineering Co., 234 U. S., page 236,*" and "*Anvil Mining Co. v. Humble, 155 United States, page 552,*" which the Court of Appeals failed to follow.

Petitioner shows that the United States Circuit Court of Appeals *ignored* the following decisions of the United States Supreme Court, which decisions regard repudiation and spoliation of citizens with abhorrence:

> *Perry v. United States, 79 L. Ed. 912, 918:* "WHEN the United States with Constitutional Authority, *makes contracts,* it has rights and *incurs responsibilities similar* to those of individuals who are parties to such instruments. There is no difference, said the Court in United States v. Bank of the Metropolis, 15 Pet. 277, 392, 10 L. ed. 774, 779, except that the United States cannot be sued without its consent."
>
> "The United States is as much bound *by its contracts* as are individuals." *Union P. R. Co. v. U. S. (Sinking Fund Cases), 99 U. S. 700.*

"*The same principles* of *right* and *justice* which prevail between *individuals* should *control* in the *construction* and *carrying* out of *contracts* between the Government and individuals." *U. S. v. Utah, N. & C. Co., 199 U. S. 414, 26 Sup. Ct. Rptr. 69.*

"The Supreme Court will apply to contracts made by the Government the same construction and effect as to contracts between individuals." *U. S. v. Smoot (Smoot Cases), 15 Wall. 36.*

"*A Government contract* should be interpreted as are contracts between individuals, with a view of ascertaining the intention of the parties and to give effect accordingly, if that can be done consistently with the terms of the instrument." *Hollerbach v. U. S., 233 U. S. 165, 34 Sup. Ct. Rep.*

"The Government should be animated by a *justice* as anxious to *secure* the *rights* of the *bidder* for its contract as to insist upon its own." *U. S. v. Purcell Env. Co., 249 U. S. 313, 39 Sup. Ct. Rptr. 300.*

15.

Point 3.

Petitioner shows that it had an assignment from the contractor of all of its equipment on the job, and a contractual agreement with the American Bank & Trust Co., who held a chattel mortgage on all of the equipment on the job, and who guaranteed petitioner if it signed Grasser Contracting Company's bond (See Resolution and Letter, R. 87-88) that it would not deprive them of the equipment used on this job until the contract *was completed and accepted.*

16.

Point 3.

Petitioner shows that after receipt of the letter from Lt. Col. J. N. Hodges, April 3, 1934 (R. 68-69) and P. M. Milner's reply thereto (R. 69-70), Mr. Milner, representing the Continental Casualty Co., considered the matter closed, and that the Government would *not make monthly progress payments.* On April 24, 1934, thereafter, the American Bank & Trust Company made a settlement with the Trustee in Bankruptcy and released its Bucyrus Dredges and equipment and sold same to Cralan, Inc., for $60,000. (R. 98-109).

Petitioner shows that from and after April 24, it could not have gone on with the work because it had lost the use of the equipment and two Bucyrus Dredges necessary for the work, but on April 28, too late, because petitioner had lost the Bucyrus Dredges and equipment, and was irreparably injured, Lt. Col. J. N. Hodges sent him a telegram notifying him that they would prepare a supplemental contract, but petitioner shows that this supplemental contract was not forwarded to him until May 10, 1934 (R. 95-98), long after the equipment and Bucyrus Dredges had been released.

17.

Petitioner shows that after Lt. Col. J. N. Hodges, acting within his rights, under Article IX of the contract, quoted herein and in the Court of Appeals' Opinion, *had waived the right of the United States upon termination of the contractor's right to proceed to itself complete the contract, and had waived the right at that time to sub-contract*

the work, in *which event* if either one of these two courses had been pursued, the Surety would have been liable to the Government as a fixed liability for every dollar of excess cost, and after said Lt. Col. Hodges had made a legal and valid contract with the Continental Casualty Co. to complete the work at 8 cents a cubic yard, with monthly progress payments, *it was beyond the power of Lt. Col. Hodges* to re-advertise the contract, which he did, and to award same to Cralan, Inc., at an excess cost of .0289 cents, and to give Cralan & Co., Inc., monthly progress payments and charge the Continental Casualty Co. with $28,963.72 (R. 86) excess cost. Under the contract awarded to the Continental Casualty Company, the United States would have suffered no damages because no matter what it cost the Continental Casualty Co. to complete the work, all the United States would have had to pay was 8 cents per cubic yard, original contract price.

Point 4.

Petitioner assigns this action of Lt. Col. Hodges re-advertising the contract after his formal waiver as illegal and assigns the recognition of this contract with Cralan, Inc., by the Court of Appeals in awarding damages against the Continental Casualty Co. of excess cost of $28,963.72 as error of law.

18.

Point 5.

Petitioner shows the Court that the claim of the United States, upon which suit has been brought (R. 82 and particular page 86) of an item of damages of $14,-479.87, is thoroughly unwarranted, disputed, and illegal,

being so-called Area and District Overhead, alleged cost to the Government, which only could have been charged against the Surety upon the default of the contractor, if the United States had completed the work itself under its options, and petitioner assigns recognition of this claim as error of law by the Court of Appeals.

19.

Point 6.

Petitioner represents that it is of immense importance that the Highest Court in the United States should once and for all time interpret Article 9 of the Standard Form of Contract for Government Work, so that Bidders and Surety Companies signing these bonds should know just exactly the legal effect of terminating the right of the defaulting contractor to proceed with the work, the liability of the Surety on the Bond becoming fixed, upon the United States availing itself of one of the two options reserved to, to-wit: to take over the equipment and complete the work itself, or complete the work by awarding at that time a subcontract surety, in both of which events the surety's liability is fixed and must pay every dollar of cost of completing the work.

Point 7.

Petitioner represents that it is also of momentous importance that this Honorable Court should decide that the Administrative officer under Article 9 of the Standard Form of Government Contract, by way of minimizing damages to the United States, has the right to waive exercising the Government's options and to contract with the Defaulting Contractor's Surety to complete the work accord-

ing to the terms of the contract, and when he has done so, to declare that the contract is a binding legal contract on the part of the United States and cannot be repudiated in defiance of the settled opinions and jurisprudence of this Honorable Court, to be quoted in supporting Brief, and petitioner assigns as error the ruling of the Circuit Court of Appeals, ignoring these authorities.

WHEREFORE, petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding such Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit, had in the case numbered and entitled on its docket "No. 9496, Continental Casualty Company, appellant, v. United States of America, appellee," to the end that this cause may be reviewed and determined by this Court as provided for by Section 347 of Title 28, U. S. C. Judicial Code, 240, as amended, and that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and that such other and further relief be had as to this Court may seem proper.

CONTINENTAL CASUALTY COMPANY,

(Seal)

By ROLLIN M. CLARK,
Vice-President,
Petitioner.

PURNELL M. MILNER,
Attorney for Petitioner.

Dated September 5, 1940.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

The District Court's opinion will be found in the Record at pp. 234, 244, and in 29 Federal Supp. 598. The opinion of the United States Circuit Court of Appeals was rendered on July 9, 1940, affirming judgment of District Court in favor of the United States against Continental Casualty Company, for $26,744.70, with legal interest at 5% from October, 1935. See Record, pp. 273, 278, and 113 Federal (2nd) 284.

2.

Petition and supporting brief for rehearing was filed July 26, 1940.

3.

Order denying rehearing was entered August 2, 1940.

4.

Motion and Order staying Mandate was filed August 6, 1940, and Mandate stayed 45 days.

5.

JURISDICTION.

A petition for review on Writ of Certiorari of a decision of a Circuit Court of Appeals is authorized by Title 28, paragraph 347, U. S. Code (Judicial Code §240) amended. Supreme Court Rule 38.

6.

The foregoing petition sets forth, we believe correctly and succinctly the issues in the case and the errors of law of the Court of Appeals, which require reversal.

7.

In order to clearly appreciate the *fundamental* errors of law committed by the Honorable Court of Appeals, it is necessary to understand:

8.

That counsel for the United States and the surety *stipulated the facts* on which, jury being waived, this case was to be tried. (Stipulation, R. 52-53-54-55-56-57) as follows:

> "It is stipulated and agreed between counsel for the United States and counsel for the Continental Casualty Company that this cause *shall be tried* on the following *agreed facts*, together with such additional facts and evidence as either party may desire to offer and produce."

And then *because* the United States had *misstated* the *exact facts in XI* of the petition the *United States Attorney agreed:*

9.

> "In relation to Art. XI of the petition, it is admitted that notice of default was served on the Continental Casualty Company on March 17, 1934, but the plaintiff shall offer said notice and *produce* and *file* the *letters which followed* and passed between the Engineers and P. M. Milner, attorney of the Continental Casualty Co.
>
> March 17, 1934, notice of default.
>
> March 17, 1934, Lt. Col. Hodges' letter to Continental Casualty Co., asking if it desired to complete the work. (R. 59-60).
>
> Telegram and letter of Continental dated March 22, 1934, agreeing to complete the work. (R.

61-62), *provided necessary steps to annul contract had been taken.*

March 26, 1934, letter of Lt. Col. Hodges *clearing up misunderstanding.* (R. 63-64).

March 28, 1934 (R. 64-65). Letter of surety saying: 'From the information we have here this *letter would seem to be a sufficient termination of the contract' * * * We are moving as rapidly as we can with reference to arranging for completion of this contract.*"

With all due respect to the Honorable Court of Appeals, Fifth Circuit, how can it justify predicating its conclusion of law that there was no agreement with the surety to complete the contract upon only the telegram and letter of March 22, 1934, unless by ignoring the subsequent letters of March 26, 1934, and March 28, 1934?

If there had been no further correspondence than Lt. Col. Hodges' letter of March 17, 1934, and the surety's telegram and letter of March 22, 1934, of course there was confusion there and *no meeting of minds*—and this was brought about by Col. Hodges' neglect to send the surety on March 17, copy of his letter to Grasser Contracting Company "terminating its right to proceed." Had he done so there never would have been any confusion.

But the Court of Appeals by grievous, reversible error, ignores the fact that the misunderstanding was *immediately corrected by Col. Hodges' letter of March 26, 1934* (R. 63-64) and surety's reply and acceptance March 28, 1934, (64 and 65) and *strange to say* the Court likewise ignores Col. Hodges' letter of March 31, 1934, to Receiver Landry (R. 66 [d] and [e] and Col. Hodges' let-

ter to P. M. Milner April 3, 1934 (68-69) conceding an agreement *had been reached and made.* May we ask how can a Court ignore these *stipulated facts* and immediate correction of a misunderstanding and propound so palpable and reversible error of law on the fundamental issue in the case, as to declare there was no mutual understanding?

Now unquestionably a valid legal contract was made by the United States with the Continental Casualty Co. to complete the work for 8 cents a cubic yard—at which the United States could suffer not one penny of damages.

This being unquestionably sound, our Point 4 leads us to say that this contract being made, valid and legal, instead of ignoring it, Col. Hodges illegally advertised and entered into contract with Cralan, Inc., at an excess cost of .0289 cents per cubic yard or $28,963.72. Had the United States been properly advised it should have sued the Continental Casualty Co. for *specific performance* of agreement made with it. This would have brought up the issue to the court. The surety would have answered that it was ready and willing to complete the work according to contract—and the Court would have decided that the United States should pay the surety 8 cents per cubic yard *on monthly progress payments* and we would have never had this outrageous unjust suit, and the United States would never have suffered 5 cents damages.

But no, being poorly advised, the United States ignored its contract and illegally relet the work to Cralan & Co., Inc., and now wrongfully attempts to mulct a surety, anxious, ready and willing to perform its obligation to the

United States, with damages, $28,963.72, a most unconscionable suit.

This brings us to 14, Point 1, where grantee prevents performance, the grantor is excused from performing as decided by this Honorable Court.

To hold the surety liable for this excess would be unconscionable and violative of principles set forth by the Supreme Court of the United States in the case of *United States v. United Engineering Co.*, 234 U. S. 236.

The Supreme Court said:

> "In Dodd vs. Churtion, L. R. 1 Q. B. 1897, 562, 568, CHITTY, J., said: 'The law on the subject is well settled. The case of Holmes vs. Guffy (3 M. & W. 381, and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated in Comyrs Digest Condition L (6) that (emphasis ours) *where performance* of a *condition* has been *rendered impossible* by the *act* of the *grantee* himself, the *grantor is exonerated* from performance of it. The law on the subject was very neatly put by BYLES, J., in Russell v. Bandeira (13 C. B. ... N. S. 149. *This principle* is *applicable not to building contracts only*, but to *all contracts*. If a man agrees to do something by a particular date or in default to pay a sum of money as liquidated damages the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time. This fact (the difficulty of proving actual damages, if such it be, would not permit the Government by its own fault to prevent the performance of the contract and do that which amounts to a waiver of the stipulation and then *insist on it as a rule of damages.*"

The Court of Appeals declares Col. Hodges' action was in nature of laches or negligence for which the United States is not bound. Conceding the contract made with the surety was valid, legal and binding, his act was *repudiation* and spoliation as we set forth by Your Honors' decisions, Page 7, 14, Point 2, of our petition.

It would be a useless task to point out the remarkable errors of statement made by the Court of Appeals. Court says, p. 4 of opinion:

> "Appellant occupies unusual position. It predicated its agreement to take over and complete the work upon the condition that the contract be absolutely cancelled."

True this proviso was in telegram and letter of March 22, 1934; the Court grievously errs when it says we predicated our averment to take over the work on this telegram and letter which is not true as the Court deliberately ignores the rest of the correspondence of Col. Hodges and surety *correcting this misunderstanding* not only coming to a *mutual understanding* but deliberately ignoring Col. Hodges' admission on March 31, 1934, and April 3, 1934, that the surety had

> "signified its desire to complete work in accordance with the terms of the contract"

and

> "has signified its intention to complete the work in accordance with the terms of the contract."

Finally the allowance of the item of government area and district overhead, $14,399.87, was never analyzed by the Court, despite the bitter fight we put up against this unconscionable *bookkeeping percentage charge* of the gov-

ernment against its divisions over the United States. Such a charge could at best, only be made where the government takes over the equipment and the job and completes the work itself.

Your Honors advise us to be brief but it is impossible in justice to our client and Your Honors, not to fully analyze what we consider the error of the Court of Appeals in simply ignoring this point and in bluntly and unfairly saying, without rhyme or reason, that the government's claims have been proven. Please bear with us and prevent a miscarriage of justice.

In the statement which is embodied in the petition and on which the judgment rendered in this case is based (R. 13-18), the defendant is charged with "Government Cost", which is composed of two items, "Job Overhead" and "Area, District and Division Overhead", and amounts to $14,399.87, detailed as follows:

Picayuneville-Waterloo Levee, Item R805-A:		
Job Overhead	$6,769.12	
Area, District, and Division Overhead	4,825.18	$11,594.30
Picayuneville-Waterloo Levee, Item R-805-B:		
Job Overhead	697.27	
Area, District, and Division Overhead	833.48	1,530.75
Dicharry Levee, Item L-891:		
Job Overhead	731.94	
Area, District, and Division Overhead	542.88	1,274.82
Total		$14,399.87

The "Job Overhead", it appears, (R. 177), consists merely of the cost of inspection, supervision, etc., charged to the particular job. The basis of this suit, however, (and, of course, the *only* basis upon which it could be filed), is that the work as completed by Cralan, Inc., cost the Government *more* by so much than it would have cost had it been completed by the Grasser Contracting Company, the main item being the difference between the cost of placing the number of cubic yards still to be put in position when Grasser defaulted at the price paid to Cralan and the cost of placing said yardage at the price specified in Grasser's contract.

The Government would, however, have been compelled to bear this "Job Overhead" had Grasser completed the work and there is absolutely nothing in the record to show that it amounted to any greater sum with Cralan doing the job than it would have with Grasser nor is it reasonable to suppose that it cost any more to supervise and inspect Cralan's work than it would have to supervise and inspect Grasser's.

This item, therefore, does not constitute any part of the *increased* cost of having the job completed by Cralan but is part of the Government's proper and normal share of the expense of having the work done and would, *in both cases*, have had to be borne by the Government. In the absence of evidence to the contrary, it is to be presumed that it would have run the same in both instances.

If the foregoing item "Job Overhead," cannot properly be included in the amount chargeable to Grasser's surety as the increased cost of completing the work, still

less can the "Area, District, and Division Overhead". This is not composed of any definite items specifically chargeable, in *any* sense, to this particular job, but is merely a proportion of the cost of operating the Government's offices in the division in whose jurisdiction the job was done and represents merely a percentage chargeable to this particular job *purely as a matter of government accounting.* It is merely a question of apportioning the Government's *own* expense of operating its *own* offices among all the jobs done in the division *solely as a matter of bookkeeping.*

It was thus not an outlay that was incurred as the result of having the work finished by Cralan or one that would not have been incurred if Grasser had finished it. The expenditure the Government made for maintaining its offices was exactly the same with Cralan taking over the work as it would have been with Grasser handling it to its completion and, although the Government may allocate its overhead among the various jobs handled in the division in proportion to the contract cost of the jobs and would thus impute a greater proportion of said overhead to the job with Cralan completing it than with Grasser completing it because the contract cost of completion was greater with Cralan than it would have been with Grasser, the Government has no right whatsoever to foist this purely factitious bookkeeping increase upon Grasser's surety.

Let us see just what are the items composing this "Area, District, and Division Overhead". They are given by the witness LaCroix on Pages 193 and 194 of the record and are as follows:

> Salaries of officers, engineers, and draftsmen of the district and division whose duties are of a

general nature and of the administrative and clerical force of the district and division offices.

Rent, light, and heat of the district and division offices.

Depreciation and maintenance of buildings and upkeep of grounds of the district and division offices.

Depreciation and upkeep of office equipment of the district and division offices.

Office supplies used in the district and division offices.

Cost of general inspections which cannot be allocated to specific jobs.

Telephone and telegraph charges which cannot be allocated to specific jobs.

Costs of safety section (whatever that may be) which cannot be definitely allocated to specific jobs.

The Government, of course, could have kept its books in either one of two ways. It could have maintained two separate records, one of the cost of the various jobs done and one of the cost of maintaining the Government's offices, in other words, the overhead. It could, on the other hand, as it did in fact do, have combined the two accounts, totaling the cost of all the jobs done and totaling all overhead, figuring what ratio or percentage the one bore to the other, and adding to the cost of each job that percentage of the overhead.

Thus, if the overhead in a given year amounted to $50,000.00 and if, during that year, there were ten jobs done costing $100,000.00 making a total of $1,000,000.00 for the year, the overhead would be five percent of the total

job cost and to the cost of each job would be added five per cent, or $5,000.00, the ten jobs absorbing the $50,000.00. This procedure would, by the end of the year, as the witness LaCroix phrased it, (R. 199), "clear out the overhead account", and the entire cost of operating the division offices would be charged to the jobs. This, however, would be purely a matter of bookkeeping practice, the overhead item, or percentage, being charged *not to the contractor* but *to the job.* (R. 203-4).

Suppose, now, we carry the illustration a little further.

Suppose one of the contractors defaults on his $100,000.00 job when only half of the work, or $50,000.00 of it, has been finished and suppose that the contract for the remaining $50,000.000 is re-let for $70,000.00. This will make the total cost of the job $120,000.00 instead of $100,000.00, increasing the cost of all jobs done in the division during the year to $1,020,000.00, and it will reduce the percentage applicable to each job for the absorption of the overhead to .049 (approximately) but will increase the proportion of the year's overhead chargeable to the job from five per cent of $100,000.00, or $5,000.00, to 4.9 per cent of $120,000.00, or $5,880.00.

This is precisely the thing that has been done in this case. The total Area, District, and Division Overhead of the Government has not been increased a fraction of a mill by the re-letting of the unfinished Grasser contract to Cralan but the proportion of that overhead imputable to the job has been increased by several thousand dollars purely as an arbitrary bookkeeping matter resulting from the

method of accounting followed by the Government. This does not represent in any sense any actual increase in cost to the Government but merely an increase in the proportion of overhead chargeable, *as a bookkeeping fiction*, to the *job*, but never, in any event, either in the case of an original or in the case of a re-let contract, chargeable, even fictitiously, to the contractor.

Furthermore, and still more outrageously, the Government has evidently figured the percentage, .053, (R. 206), on *the entire cost of the work done by Cralan*, not on the increased cost as compared with Grasser's contract. The Area, District, and Division Overhead on the Picayune-ville-Waterloo Levee, Item R-805-A, the first job shown on the statement embodied in the petition (R. 13-18), is $4,-825.18, which is .052966 of the payments made to Cralan ($84,330.64) plus the Job Overhead ($6,769.12), or $91,-099.76; and the same thing is true on the other Picayune-ville-Waterloo Levee job, Item R-805-B, and the Dicharry Levee job, Item L-891.

Suppose we take for illustration the case of a private individual, a man who, we will assume, is engaged in the business of buying lots and erecting dwellings on them which he offers for sale or rent. If he does this in any appreciable volume, he will have to maintain an office, for which he will have to pay rent; will have to employ a secretary or stenographer; and will have certain other expenses in the form of stationery, postage, etc. He will also, let us say, employ two or three inspectors whose business it will be to supervise the work of construction, who will be paid so much per hour, and whose fees will thus be determined by the amount of time devoted to each job.

This man lets out the work of building his houses to various contractors and, in order to determine with as much precision as possible, the cost of each particular property, he adds to the price of the lot and the contract price of the building the fee he is required to pay his inspector and any other similar items that can be definitely identified as imputable to that job. He also totals the cost of all the houses built during the year, totals all of his general office expenses, determines the percentage of the former that the latter represents, and adds that percentage to the cost of each house, thus erasing from his books all overhead costs, both specific and general, and arriving at a figure for each job which represents what the job actually cost him.

But by what process of reasoning could it be said that any of the contractors with whom he does business and to whom he agrees to pay stipulated prices for erecting his houses have anything to do with these overhead costs or with his method of handling them on his books?

Suppose one of these contractors defaults. Suppose the unfinished work at that time amounts in value to $2,000.00 out of a $5,000.00 contract and that our friend has the job completed by someone else at a cost of $2,500.00. The original contractor would, of course, owe him $500.00 but it would require pretty strong and convincing evidence to induce a court to believe that the work of inspection with the second contractor required more of the inspector's time than it would have with the first, and, in the absence of such evidence, it is absolutely certain that no recovery for this claimed additional cost would be allowed.

But if any claim for this additional "Job Overhead" would, in the absence of conclusive proof, be rejected, what can be said of the general overhead? The cost of the job under the original contract was $5,000.00 and the actual cost, after re-letting the contract, was $5,500.00. Thus, if our friend re-casts his accounts in order to apportion his general overhead more accurately, there will be imputed to the $5,500.00 job under the re-let contract a larger share of general overhead than there would have been to the $5,000.00 job under the original contract. But is it possible, as a legal concept, to imagine that he would have even the flimsiest shadow of right to demand this purely fictitious "increase" from the original contractor or his surety as part of the extra cost of completing the work?

The answer is most emphatically "No"; and, as it is with a private citizen, so must it be when the "owner" is the Government.

In the performance of any levee or other similar job for the Government, the cost of doing the work is divided into two classes, the price which the Government must pay to the contractor who undertakes the job and the Government's own expense which is itself subdivided into items allocable to the particular job, or "Job Overhead", and a proportion of the general cost of operating the Government's offices or "Area, District, and Division Overhead". The Government's own cost, consisting of the latter two items, is, of course, something with which neither the contractor nor his surety has anything to do and it cannot be conceived by the wildest flight of the imagination how either of them can owe either of these items to the Government.

Neither of them, in fact, owes the Government anything. The contractor deals with the Government as with any other individual or entity. He knows, of course, that the Government must have its own general overhead and will incur some special overhead expense in supervising his particular job, but he does not undertake to *pay* any of this. He undertakes to do the work for a specified price and the Government undertakes to *pay him* that price *in addition* to bearing its own expense. And if he defaults on his job and it becomes necessary for the Government to have another contractor complete the work, there is no more reason than in the first instance for charging him or his surety with the "Job Overhead" (except perhaps to such extent as it may have exceeded the same item incurred in connection with the original contract and then only in the event that positive affirmative proof is adduced of the amount of such excess, no attempt to do which was made here) ; and there is absolutely no reason, justification, or excuse for charging him with the "Area, District, and Division Overhead", every cent of which the Government would have to pay in any case and the amount of which is not in the remotest degree increased or affected in any way by the necessity for reletting the contract.

This item, involving the very considerable sum of $14,399.87 with five years 5% interest, was apparently given no special consideration by the Court of Appeals since no specific allusion was made to it in its opinion by the said Court, which brushed aside our most strenuous and vehement objection to it with the superficial and general phrase "The record contains substantial evidence to support the finding of damages made by the trial court".

It is impossible for us to believe that the Court consciously approved the allowance of this item and, considering the general character of the language quoted, we can only assume that the Court either overlooked it entirely or was unaware of its real nature. It amounts, however, with interest, to something like $18,000.00, which is a pretty substantial sum in any man's economy, and to approve it means the mulcting of this defendant of this very large amount for which it is no more liable than for the cost of erecting the government office building at New Orleans.

We now ask this Court, in all earnestness, whether this tribunal, the highest court in the land and our last resort in our appeal for justice, will permit the allowance of this unconscionable charge.

We ask pardon for arguing this point so fully but the rights of our client demand it.

In its declaration of policy relative to the issuance of writs of certiorari set forth in Rule 38, Paragraph 5 (b), this Court indicates that an application for a writ will be entertained—

> "Where a Circuit Court of Appeals . . . has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. . . ."

We believe that there is none among the vast multitude of questions treated in the whole great framework of the law more vitally important than the simple issue whether a man shall be required to pay $18,000.00 that he does not owe and no decision of that question in a way

more flagrantly in conflict with the fundamental principles upon which the "weight of authority" is supposedly based than the arbitrary decree that he must pay it.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

PURNELL M. MILNER,
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New Orleans, La.,

September 9, 1940.

FILED
OCT 21 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

REPLY OF CONTINENTAL CASUALTY COMPANY

To

BRIEF OF SOLICITOR GENERAL, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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SYLLABI—INDEX

1.

As this case is *sui generis* and *res nova*, we cite no authorities but deny applicability of Solicitor General's authorities, page 7: *South Boston Iron Co. v. U. S.*, 118 U. S. 37; *Bedding Company v. U. S.*, 266 U. S. 491; *Erie Coal Co. v. U. S.*, 266 U. S. 518.

2.

We deny we ever claimed that the Repudiation of Contract by Col. Hodges *discharged* the Continental Casualty Company's *Bond* as stated page 8 of Solicitor's Brief. We admit now this act did not discharge Surety's liability to the United States and that the Bond has always been in effect, and liability for liquidated damages and Government overhead, Statement, this brief, page 11, exists if our contentions as to them are unsound.

3.

Our claim specifically has always been that Lt. Col. J. N. Hodges who signed the contract and administered the work, had full and complete and specific authority under Article IX (a) to notify defaulting contractor "its right to proceed was terminated" thus fixing Surety's liability, but to determine just what that fixed liability was, the United States necessarily had to *exercise its options:*

(a) Take over equipment and complete the work itself, or

(b) Sub-contract the work to ascertain Excess Cost and Damages.

But the United States did neither, waived its options and the Administrative Officer undertook com-

SYLLABI—INDEX—(Continued)

pletion under specific authority "otherwise" by contracting with the Surety at original 8 cents a cubic yard, thus preventing any excess cost or damages to the Government.

When Government prevented performance by Surety by refusing to make monthly progress payments, having waived its options, it was illegal to revive its waived option and contract with Cralan, and the Surety was released from performance and could not be made liable for Cralan's excess costs.

4.

This is the point *res nova,* never decided by any Court or by this High Tribunal.

5.

If Continental Casualty Company is right as to this point this strikes out Cralan excess cost $28,963.72 in Government's Statement (R. 86), page 12, this Brief, and the admitted credit due Surety of $21,268.89 for retained percentages and credits at date of default is more than sufficient to wipe out the $4,600 liquidated damages and Government Area and District Overhead $14,479.87 or total of $19,079.87—and the Surety owes the United States nothing.

"ERRATA"

"In Syllabi 2 "page 11" should be "page 10".

Also in Syllabi 5 "page 12" should read "page 10".

Also on page 9, last paragraph, sentence is "In the first place this case does *not* apply." "*Not*" having been left out."

IN THE

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To

BRIEF OF SOLICITOR GENERAL, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

May we say, in candor, but with entire respect, that it is our opinion no opposition to this writ can be made unless predicated upon ignoring the fundamentals of the case, the stipulations of agreed facts and on fallacious and unsound conclusions of law.

These fundamentals are:

First

Failure to appreciate that this case is

Sui generis.

There is, as far as we can find, not another case in our jurisprudence like it, hence it is *res nova.*

Second

There is not a single disputed fact, so found by the Court of Appeals.

The *figures* of the Government's claims are not denied.

The surety only denies its liability for the claims propounded.

Third

Nothing is to be decided except *Points of Law.*

Fourth

The case was submitted on a

Stipulation

of *agreed facts* and undisputed correspondence, viz: (Tr. 52)

"It is stipulated and agreed between Counsel for the United States and Counsel for the Continental Casualty Company that this cause shall be tried on the following agreed facts, together with such additional facts and evidence as either party may desire to offer and produce"—(Tr. 52) "but no testimony or evidence" contradictory or inconsistent with the above could be offered.

A

On March 17, 1934, Lt. Col. Hodges, who signed the contract with Grasser Contracting Company, administrative officer, notified the surety by letter (Tr. 59-60) of the bankruptcy and default of the Grasser Company, but *neglected* to enclose copy of his letter to Grasser Company "terminating its right to proceed" with the contract.

He asked Surety if it desired to complete the work "in accordance with the terms of the contract."

March 22, by telegram and letter (Tr. 61 and 62), Surety stated it "desired to complete the work and would proceed provided all necessary steps have been taken to annul Grasser contract."

This proviso was caused by fact, Lt. Col. Hodges did not advise Surety he had only terminated defaulting contractor's right to proceed and sent no copy of his letter to Grasser Company.

Lt. Col. Hodges immediately corrected the misunderstanding by his letter of March 26th (Tr. 63), sending copy of his letter to Grasser of March 17th, and stating "It is the view of this office that this constitutes the only action necessary in the premises."

The Surety by letter, March 28th, accepted this statement and stated they were moving rapidly for completion of the contract. Lt. Col. Hodges acknowledges that the Surety had agreed to complete the work in his letter to Brittmar P. Landry, Receiver, March 31st, 1934, Tr. 66 (d) and again to P. M. Milner, April 3d, 1934 (Tr. 68).

It is rather surprising that the Court of Appeals committed reversible error in holding that there was no agreement between Lt. Col. Hodges and the Surety (see our Brief in Support of Application, pages 15-16) and that the Solicitor General futilely urges same point in his Brief.

B

The contract offered the Surety and accepted, by Art. 16, required Government to make monthly progress payments.

Now what was the legal status that both the Court of Appeals and the Solicitor General unfortunately and erroneously ignored?

Article IX of the contract (R. 274) (see note to opinion Court of Appeals) and (note, page 3 of Solicitor General's Brief). Here is the whole crux of the case. It reads: "the Government may by written notice to the contractor terminate his right to proceed with the work or such part of the work as to which there has been delay." Now here is what the Court of Appeals and the Solicitor General ignore: "In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby."

This article authorizes the Administrative Officer, Lt. Col. J. N. Hodges, who signed the Grasser contract for the Government and terminated contractor's right to proceed—

(a) to take over the work and all equipment and complete itself, or

(b) by contract let out.

But the Government did neither.

By way of minimizing damages the Administrative Officer adopted the authority given him to complete the the contract "otherwise" by offering the Surety the right to complete it at original price of 8 cents a cubic yard with monthly progress payments, which the Surety accepted.

The Solicitor General quotes, *cf. South Boston Iron Co. v. United States*, 118 U. S. 37, as authority that no mutual agreement had been reached.

It seems futile to say the Continental Casualty Company had no agreement to complete the work. The letters of March 26th and March 28th speak for themselves. The decision quoted is absolutely inapt, entirely different, not parallel nor analogous to our agreement.

Analysis of Cited Cases

The offer to construct new boilers, while accepted by the Navy Department, was *conditional* to furnishing drawings and specifications. Before this was done proponent was advised to discontinue. Proponent brought suit for damages. No contract could exist until the drawings and specifications, specifying the work had been furnished, which was never done.

The Supreme Court held rightly that no contract existed—the papers or letters contemplated a further agreement based on drawings and specifications were merely preliminary memo towards preparing contract.

In our case the contract defaulted was in standard form in writing at 8 cents a cubic yard, payable in monthly

progress payments. The letter of Col. Hodges of March 26th was accepted March 28th. Everything was in writing—and nothing left to future negotiation—a complete mutual agreement. Letters formally signed.

Erie Coal & Coke Corporation v. United States, 266 U. S. 518. Case dismissed on demurrer because acceptance of a bid is not final until a contract is entered into.

U. S. Bedding Co. v. United States, 266 U. S. 491. A case not in point. Government requisitioned linters. Owner and Government disputed actual value. Later Government released all requisitions—plaintiff had no cause of action.

In the Alternative

Solicitor General says assuming that a formal proposition in writing signed by the Government's Administrative Officer and formal acceptance in writing and signed by the Continental Company complied with Revised Statutes, Section 3744, still the United States was not bound, and the Solicitor General erroneously says the Government is not bound, ignoring that Article IX of the contract tendered and accepted in writing, authorized the Administrative Officer by express provision (a) either to take over the contract by the Government, take over all equipment and do the work itself, or (b) to sub-contract the work (in either of which cases the Surety would have been bound for excess costs without any defense) or complete the contract "otherwise" which he did by agreement with the Surety.

It is impossible that this was not within the express authority given the Administrative Officer and binding on the Government.

We say with respect, the Court of Appeals erred, this being the crucial point presented to this Court by our petition.

The error of the District Court, affirmed by the Court of Appeals, is erroneously assimilating the action of Lt. Col. J. N. Hodges to cases of "negligence" or "laches" in all of which circumstances the Government is not bound *(Hale County, Texas, v. American Indemnity Co., 63 F. (2d) 275)*. But this act of Lt. Col. J. N. Hodges in refusing to make monthly progress payments was neither "laches" nor "negligence". We challenge the argument on page 6 of Solicitor General's Brief.

The contract unquestionably provided for "monthly progress payments", Art. 16.

To refuse to make the payments was "repudiation" of the "agreement" in writing by the signed letters of March 26, 1934, and March 28, 1934 (R. 61-62-63-64-65), which perfected the contract.

Counsel calls this "an erroneous interpretation" and cites *Mobley v. N. Y. Life Ins. Co.*, 295 U. S. 632. In the first place this case does apply. This was not a Government case. The Court held that the honest belief and refusal of the Life Insurance Company to pay a monthly disability benefit was not a "repudiation" of the policy. To same effect is *N. Y. Life Ins. Co. v. Vigeas*, 293 U. S. 672. The cases have no bearing as cited. The Solicitor

General has missed the entire point of our contention. We stress this point in our

Conclusions.

Here is the Government's itemized claim (R. 86).

The Court will please note that there was due Grasser and the Surety in retained percentages, etc., at date of default $21,268.89.

"(R. 86):

Yardage by second contractor, 1,002,205 @ 10.89 cents		$109,140.12
Cost under original contract, 1,002,205 cubic yards @ 8 cents		80,176.40
		28,963.72
Additional Government cost		14,479.87
		43,443.59
Less: Percentages retained and amounts due contractor at time of default	$21,268.89	
Less: Liquidated damages accrued and uncollected at time of default	4,600.00	16,668.89
Total excess cost to U. S. of completing contract		$ 26,774.70"

The point to be decided and it has never been decided before is:

Upon default of contractor, the Surety's liability is fixed under Art. IX, if

(a) The Government takes over equipment and completes the work itself, or

(b) Sub-contracts the work, or

(c) "Otherwise" agrees with the Surety to complete the work.

Question: Can the Government after waiving its options (a) and (b) and making a valid contract with the Surety (c) "repudiate" its obligation to make "monthly progress payments" ignore this agreement, treat it as never was and go back and avail itself of its waived option (b) sub-contract the work and charge the Surety with the *excess* cost.

Will this Court allow the Government to play fast and loose with an honest surety company anxious to complete its obligation to the Government as it did when it paid material furnishers and laborers $37,470.61 (R. 43-44-45).

If this High Court says no, then the *excess cost* of Cralan, Inc., doing the work after it had to buy the two Bucyrus dredges for $60,000 (R. 98-109) which necessarily added to its cost, is wrongfully charged against the Surety, $28,963.72. To this extent the Surety is perforce released under its Bond—but the Bond is not discharged.

Counsel says we urge that the breach of contract made with the Surety by Lt. Col. J. N. Hodges, *released* the Surety's obligation.

We never made and do not make any such claim. All we claim is that having waived the Government's option (b) and made valid contract with the Surety, Lt. Col. J. N. Hodges could not validly and legally repudiate this contract and hark back or go back to exercising option

waived; hence we are not liable for the Excess Cost under Cralan, Inc., contract $28,963.72.

Pretermitting discussion of the illegality of the $14,479.87 Government Area and District Overhead, the excess Cralan cost is illegal—with $21,268.89 admitted credit (R. 86), the liquidated damages even added to the unconscionable Government overhead, our $21,268.89 credit for retained percentages and credit will defeat any claim of the Government.

Respectfully submitted,

P. M. MILNER,
Attorney for Petitioner.

October 17, 1940.

Five copies sent by registered mail to Solicitor General.

P. M. MILNER.

FILED
DEC 2 1940
CHARLES ELMORE CROPLEY
CLERK

No. 435

Supreme Court of the United States

OCTOBER TERM 1940

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION OF THE CONTINENTAL CASUALTY CO. FOR A REHEARING.

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No. 435

Supreme Court of the United States

OCTOBER TERM 1940

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION OF THE CONTINENTAL CASUALTY CO. FOR A REHEARING.

The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Continental Casualty Company respectfully asks a rehearing of this cause for the following reasons:

1.

Petitioner is mindful that the Court having read the Transcript of Record, the opinion of the Honorable United States Circuit Court of Appeals, the petition for Writ of Certiorari and briefs is fully aware that the case was submitted, jury being waived, on a Stipulation of Facts, and there was no room for finding of fact by the Court, but only questions of law, but in the absence

of any *per curiam* denying the Writ petitioner is in the dark as to just wherein it failed to substantiate its right to the relief asked.

2.

Petitioner represents that, with the indulgence of the Court, without reiteration of argument, and in short, succinct statements petitioner will endeavor to give its reasons for asking for a rehearing.

3.

We respectfully urge that this case should not be considered as one where the statutory surety of a government contractor, ill-advisedly and wrongfully declines to live up to its obligation to the United States, because it agreed in writing to complete the defaulted contract, at the request in writing of Col. J. N. Hodges, administrative officer and *pro hac* vice of the United States, under special authority of the contract with Grasser Contracting Company, "Article 9—Delays—Damages."; and furthermore acquitted and discharged its full liability to unpaid material furnishers and laborers to the extent of $37,470.61 (Rec. pp. 43-46).

4.

Petitioner believes and respectfully suggests that this case, on the contrary, should be controlled by the principles announced by this High Court in *U. S. vs. Purcell Env. Co.*, 249 U. S. 313, saying that "the government should be animated by a justice as anxious to secure the rights of bidders for its contract as to insist upon its own"; and *Perry vs. United States*, 79 L. Ed. 919; "When the United States with constitutional authority makes contracts, it has rights and incurs responsibilities similar

to those of individuals who are parties to such instruments (*U. S. vs. Bank of Metropolis*, 15 Pet. 377, 10 L. Ed. 774.

5.

Petitioner respectfully believes that the Court does not disagree with petitioner in the following particulars, disclosed by the contract and letters of Lt. Col. J. N. Hodges under Art. IX of Grasser contract to-wit:

(a) That Col. J. N. Hodges was the signatory for the United States for the Grasser contract; (b) that upon Bankruptcy and default of Grasser Company, he was authorized and empowered under Art. IX to "terminate the right of Grasser Company to proceed with the work."; (c) that he had the authority to avail for the Government of its options: either to complete the work by taking possession of the equipment; or to sub-contract the work; or do what he did, agree with the Surety, Continental Casualty Co. to take over and complete the work "according to the terms of the Grasser contract", to-wit at 8 cents per cubic yard of earth handled, payments to be made by the United States in monthly progress payments.

6.

Petitioner does not know how much the Court was affected by the erroneous statement of the Court of Appeals that petitioner relied on or based its declaration that it accepted the offer of the United States to the Surety March 17, 1934 to complete the work according to the terms of the Grasser contract by its telegram and letter of March 22, 1934, the Court of Appeals ignoring the fact that the misunderstanding shown therein was corrected by Lt. Col. J. N. Hodges' letter of March 26th, 1934, for the first time advising the Surety that he had only ter-

minated the right of Grasser to proceed and that it was his opinion "this was the only action necessary in the premises", which was immediately accepted and acquiesced in by the Surety by its reply of March 28, 1934; the Court of Appeals ignoring the fact also that by letter of March 31, 1934 to Receiver Landry (Rec. 66) and by letter to Milner, April 3rd, 1934, Lt. Col. J. N. Hodges admitted the Surety had agreed to complete the work, thus making a mutual understanding and contract.

7.

Petitioner respectfully shows that it must assume this High Court must have found that this was a binding legal contract with the United States.

8.

Petitioner does not know how much the Court was affected by the mis-statement of fact in the solicitor general's brief, page 9; saying: "While petitioner might have reduced the costs if it had completed the contract, it elected not to go forward under the agreement". The Solicitor General ignored the stipulated fact that it was on April 3, 1934 (Rec. 68-69) that Lt. Col. J. N. Hodges formally advised Surety's attorney that no monthly progress payments (Note—Stipulated in Article XVI of Grasser contract) would be made and that the Surety thereupon on April 6, 1934 (Rec. 69-70-71) declined to go ahead only after it was advised no monthly progress payments would be made. Again petitioner calls the Court's attention to another serious mis-statement in note bottom at page 9 of his brief, viz.: "Moreover there is no evidence to show that petitioner could not have made the same arrangements on **April 24, 1934 when it received the offer for a supplement contract** (R. 228-229). His

statement and citation is erroneous. The indisputable evidence is that the American Bank & Trust Co. secured release of its dredges in the Bankrupt Court on April 24—and the telegram from Lt. Col. J. N. Hodges is dated April 28, 11:59 A. M. (not April 24, 1934) suggesting supplemental agreement at the request of Chief of Engineers (Rec. 72); but the supplemental suggested agreement was not received by Milner until **May 10, 1934** (Milner's testimony, Rec. 220). (Stipulation of fact (Rec. 55).

9.

The Court of Appeals said: "When the contractor defaulted in the performance of the contract by filing the petition in bankruptcy, the rights of the government and the liabilities of the Surety under the contract immediately became fixed". Petitioner respectfully shows that the statement is an abstract statement and *absque injuria*, **unless** the government availed itself of its option (a) to take over the equipment itself and complete the work (Art. 9 Delays—Damages) (Court of Appeal opinion foot note page 3) or (b) contracted the work and translated this abstract principle into actual damages, in which case the Surety would have been bound. But the government waived its options and Lt. Col. J. N. Hodges contracted with the Surety to complete the work at 8 cents a cubic yard with monthly progress payments.

10.

Petitioner respectfully shows that when the Court of Appeals committed reversible error by holding that (pages 4 and 5 of opinion) conceding a valid contract existed, the government was not bound by the "repudiation" of the contract. Petitioner urges, with respect, as established by the Circuit Court of Appeals, Fifth Cir-

cuit, that this holding is contradictory of the Court of Appeals' own decision in *Hale County, Texas vs. American Indemnity Co.*, 63 Fed. (2d) which announced the settled principle, which we do not controvert, that the government is not bound by the laches or negligence of its officers. The Court of Appeals announces this principle in the *Hale County* case and then cites 6 or 7 cases showing what particular negligence or laches that **does not** bind the government—but the act of Lt. Col. J. N. Hodges was by no stretch of imagination either **laches** or **negligence.**

11.

Petitioner respectfully submits that whatever actuated Lt. Col. J. N. Hodges in repudiating his own contract is *dehors* the issues in this case, the factual stipulation and evidence being that Col. J. N. Hodges, after getting the Surety's consent to complete the work, repudiated his valid, legal, binding contract.

12.

Petitioner respectfully shows that whatever action Lt. Col. J. N. Hodges, vested with full authority, took under Art. IX of the contract to-wit: terminating the right of the contractor to proceed; waiving the 2 options of the government and making the agreement with the surety were valid and binding agreements of the United States under the decisions of this High Court quoted, and the government could not repudiate this agreement and go back and advertise the contract under an option legally waived and re-let the contract to Cranlan, Inc., at an excess cost of $28,000 (our reply brief, p. 10) and charge the Surety with this excess cost which it could only do if it had availed itself of its option.

13.

Petitioner calls attention to just one more point heretofore unstated. The supplemental agreement offered April 28, 1934 (not April 24, as stated by Solicitor General in brief) was not received until May 10, 1934 and contained (Rec. 96) the extraordinary clause:

> "Whereas from the time of beginning of operations the contractor failed to make necessary rate progress to assure completion of the work within the contract time".

We respectfully submit that had the Chief Engineer between April 3, 1934 and April 24, 1934 offered to pay progress payments, petitioner would have gone on with the work and the United States would not have suffered one dime of damages or excess cost.

14.

We respectfully urge that the government cannot charge the continental Casualty Co. with the $28,963.72 excess cost of Cranlan, Inc., doing the work—and if this is true the Continental Casualty Co. does not owe the government one dime because the government concedes its liability to the Surety for percentages retained and amounts due at time of default for $21,268.89 (see statement, page 10, our reply brief).

Petitioner shows that the foregoing remarks pretermit any discussion of the Surety's liability for the Government area and District overhead of $14,399.87, which the testimony clearly shows is a paper or bookkeeping arbitrary percentage charged against District work all over the United States, to ascertain what Government work is costing the Government, and as the

Government witness testifies, is never charged against the job unless the Government completes the work.

The stipulation of fact stipulates that the right to charge these items is submitted as a conclusion of law, without question of the accuracy of the figures.

We respectfully submit this petition for a rehearing.

PURNELL M. MILNER,
Attorney for Continental Casualty Co.

Nov. 25, 1940.

CERTIFICATE

I certify I have by registered mail sent 5 copies of this petition to the Solicitor General at Washington, D. C.

PURNELL M. MILNER.

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266502—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Louisiana (R. 234–244) is reported in 29 F. Supp. 598. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 272–276) is reported in 113 F. (2d) 284.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on July 9, 1940 (R. 276). A petition for rehearing (R. 277–280) was denied August 2, 1940 (R. 281).

The petition for a writ of certiorari was filed on September 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This is a suit by the Government against a surety for liquidated damages and excess costs incurred upon default by the contractor. The questions presented are:

1. Whether certain correspondence which ensued after the default between the surety and the Government's contracting officer gave rise to a contract for the completion of the work by the surety, and, if so—

2. Whether the contracting officer's subsequent statement that no progress payments would be made was a breach of that contract.

3. Whether a breach of the contract relieves the surety of its original obligation on the bond.

4. Whether there was evidence to support the amount of damages awarded.

STATEMENT

On November 17, 1932, the United States entered into a construction contract with the Grasser Contracting Company as principal (R. 3, 53), and the Continental Casualty Company, petitioner, as surety (R. 3, 4, 53). Certain items were to be completed by February 27, 1933, and others by September 25, 1933 (R. 4, 53, 235, 236). The contract and

specifications provided for liquidated damages at the rate of $20 per day per item for each day of delay beyond the date set for completion (R. 5, 236). Although certain items were not completed on time, the contractor was permitted to proceed until March 17, 1934. On March 16, 1934, the Grasser Company filed a voluntary petition in bankruptcy in the Eastern District of Louisiana, New Orleans Division, which under the contract operated as a default by the contractor (R. 5, 236). On March 17, the contracting officer of the United States declared the Grasser Company in default pursuant to the provisions of Article 9 of the contract (R. 5, 58, 59, 236),[1] and on the same date advised petitioner

[1] Article 9 of the contract provides (R. 274):

"* * * If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated dam-

of the action taken, requesting it to state whether or not, as surety, it desired to complete the work (R. 59–60, 237). In response, petitioner advised that it would complete the contract "provided all necessary legal steps have been taken by the government to cancel and annul the Grasser contract" (R. 61, 62, 237). On March 26, 1934, the contracting officer wrote that the notice of default was "the only action necessary in the premises" (R. 63–64, 237). In a letter of March 28, 1934, petitioner agreed that "this letter [of March 17, 1934] would seem to be a sufficient termination of the contract" (R. 64, 237), suggesting, however, that notice be served upon the receiver or trustee in bankruptcy or upon the Bankruptcy Court (R. 65, 237). Notice was served on the receiver (R. 65–66).

On April 3, 1934, petitioner's attorney requested to be advised whether it would be the policy of the contracting officer to make progress payments to the surety (R. 67, 239). On the same date the contracting officer, inaccurately citing a syllabus from a decision of the Comptroller of the Treasury (4 Comp. Dec. 611), wrote that "no payments may be made to the surety during the progress of the work" (R. 68–69, 239, 240).

In a reply letter of April 6, 1934, petitioner stated that the contracting officer's letter of April 3, 1934,

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ages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; * * *."

was a modification of the terms of the contract, not acceptable to petitioner, and that, consequently, petitioner "will not complete the contract under these new terms and conditions" (R. 71, 240). On April 28, 1934, petitioner was informed that a supplementary contract with progress payments might be entered into (R. 72, 240), but on May 2, 1934, petitioner refused this offer (R. 73–78, 240).

On July 24, 1934, petitioner was notified that bids would be opened on August 8, 1934, for the completion of the unfinished items and that the surety would be held liable for any excess costs occasioned the Government thereby (R. 6, 240). A new contract was let to Cralan, Inc., of New Orleans, Louisiana (R. 7, 240) at a cost substantially in excess of that of the original agreement. After completion of the work, the Government filed this suit to recover from the surety the excess cost, together with liquidated damages under the contract for delay from the contract date of completion until the Grasser Company was declared in default.[2]

The District Court, after making findings of fact (R. 234–242) and conclusions of law (R. 242–243), entered judgment for the Government. The District Court held that there was no contract between the Government and petitioner for the completion of the work; that if there were a contract, the action of the contracting officer was not a breach

[2] The Government's claim for $26,774.70 is itemized at pp. 13–18 of the record.

thereof; and finally, that if there had been a breach of contract petitioner had not been damaged. A motion for a new trial (R. 245–254) was overruled (R. 255). The Circuit Court of Appeals for the Fifth Circuit affirmed (R. 272–276).

ARGUMENT

This action is one to recover from petitioner, the surety on a contractor's bond, damages sustained by reason of the default of its principal. The default is not denied. While conceding its original liability, petitioner contends that it entered into a new contract with the United States to complete the work remaining under the original contract, and that it was relieved of liability on the bond because the contracting officer, on April 3, 1934, stated that progress payments would not be made to petitioner if it undertook to complete the work. The petitioner further contends that certain items of damages were improperly allowed. The courts below found against petitioner on each issue of fact and law, and the case presents no question which would warrant review by this Court.

1. (a) There was no agreement for the petitioner to proceed under the old contract. If the petitioner's contention is that it had undertaken to perform the original contract, the answer is that the contracting officer and petitioner never reached a mutual understanding to this effect (R. 242, 275).[3]

[3] The District Court held (R. 242–243): "The evidence in this case shows the absence of any mutual understanding or

Cf. *South Boston Iron Co.* v. *United States,* 118 U. S. 37. If the petitioner contends that the parties executed a new agreement, it is met with a further and additional difficulty that the agreement was never executed by formal writing as required by Revised Statutes, Section 3744 (*Bedding Company* v. *United States,* 266 U. S. 491; *Erie Coal Co.* v. *United States,* 266 U. S. 518).

(b) Even assuming that a definite contract for the completion of the work had been entered into, the contracting officer's letter of April 3, 1934, stating that no progress payments would be made, did not amount to a breach of the contract by the United States. It is not contended that the contracting officer had authority to construe the agreement. So far as appears, therefore, the contracting officer's interpretation amounted [4] at most to an erroneous conclusion of law by a Government officer on a question beyond his competence, and the Government was not bound by his unauthorized

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agreement between the parties in that the defendant's expressed desire to complete the work in accordance with the terms of the contract was conditioned upon the cancellation and annulment of the Grasser contract; whereas, the contracting officer did not contemplate a cancellation and annulment of the Grasser contract, but rather the termination of the contractor's right to proceed with the work and the completion thereof by the surety in the name of the contractor."

[4] The contract (Plff. Ex. 2) which is not printed in the record contains nothing to show that the construction of the agreement was within the scope of the contracting officer's authority.

action.[5] Moreover, the erroneous interpretation did not amount to a repudiation of the alleged agreement. *Mobley* v. *New York Life Ins. Co.*, 295 U. S. 632; *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672.

(c) The conclusive answer, however, is that the breach of contract, if any, did not relieve petitioner of its obligations under the original agreement. Upon the default of the contractor, petitioner's liability as surety became fixed. *United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512; *Board of Education* v. *Maryland Casualty Co.*, 27 F. (2d) 20 (C. C. A. 3d). It is not and cannot be contended that the agreement, if any, between the petitioner and the contracting officer was intended to release petitioner from its liability as surety under the original contract. *American Employer's Ins. Co.* v. *United States*, Court of Claims No. 43921, decided May 6, 1940; *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. The petitioner is,

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[5] The matter under discussion was one for decision of the accounting officers of the Government, as is shown by the decision which the contracting officer cited (4 Comp. Dec. 611). Acts of federal agents in excess of their authority do not bind the United States. *Whiteside* v. *United States*, 93 U. S. 247, 256; *Hawkins* v. *United States*, 96 U. S. 689. See also *Jones* v. *United States*, 18 Wall. 662; *Hale County, Texas*, v. *American Indemnity Co.*, 63 F. (2d) 275, 279 (C. C. A. 5th); *The Underwriter*, 6 F. (2d) 937 (D. Conn.). Moreover, the opinion cited by the contracting officer disclosed on its face that his construction was erroneous. The petitioner, however, made no effort to obtain reconsideration of the question.

therefore, obligated to pay liquidated damages from the contract date of completion to the date of default, and, in addition, to pay the excess costs and actual damages sustained in the completion. *American Employer's Ins. Co.* v. *United States, supra;* see also *Fidelity & Casualty Co.* v. *United States, supra.* While petitioner might have reduced the excess costs if it had completed the contract, it elected not to go forward under the agreement. Moreover, petitioner has not shown that it could have completed the contract for an amount less than the bid submitted by Cralan, Inc.[6]

2. Petitioner also urges that certain items of damages, grouped under the heading of "Govern-

[6] Petitioner alleges that it had an assignment from the contractor of all the equipment on the job and an agreement with the American Bank & Trust Company, mortgagee of the machinery, that the latter would not deprive petitioner of the equipment until the job was completed. Petitioner alleges further than after receipt of the contracting officer's letter of April 3, 1934, it considered the matter closed, and that on April 24, 1934, the mortgagee made a settlement with the Trustee in Bankruptcy and sold the equipment to Cralen, Inc. (Pet. 8–9). But the correspondence between petitioner and the American Bank & Trust Company shows clearly that the latter had no intention to permit petitioner to use the equipment without payment of rental (R. 127–130, 126, 121–123, 125, 227). Moreover, there is no evidence to show that petitioner could not have made the same arrangements on April 24, 1934, when it received the offer for a supplemental contract (R. 228–229). In any event, as stated *supra*, petitioner has not shown that, even with the Grasser equipment, it could have saved more than the amount it now must pay.

ment Costs" were improperly allowed (Pet. pp. 18–28). "Government Costs" were composed of two elements: Job Overhead and Area, District and Division Overhead. Petitioner apparently contends that these costs were not damages sustained by the United States. The trial court found as a fact, however, that "Government Costs" "constitute an item of damage actually sustained by the Government" (R. 241). The court below in addition found that "the record contains substantial evidence to support the finding of damages made by the trial court" (R. 276).

Independently of the findings of the courts below, "Government Costs" were proper items of damage. Job Overhead represented sums actually spent on the job for inspection, supervision, etc. (R. 177). These are properly recoverable when expended after the contract date of completion. *United States* v. *Breymann,* 228 Fed. 808 (D. Mass.); *United States* v. *McGee,* 171 Fed. 206 (W. D. Mo.). Area, District and Division Overhead not allocable to particular jobs, but charged to jobs on a percentage basis, is also recoverable. See *M. H. McCloskey, Jr., Inc.,* v. *United States,* 66 C. Cls. 105; *Dow Pump Co.* v. *United States,* 68 C. Cls. 175; *Pope* v. *United States,* 75 C. Cls. 436. Petitioner's argument that these expenses would have had to be borne if Grasser Company had completed the job (Pet. 20) overlooks the fact that if the Grasser Company had completed on time, they would not

have been necessary, and that if the Grasser Company had continued with the work instead of Cralan, Inc., the liquidated damage provision of the contract would have indemnified the Government.

CONCLUSION

The decision below is correct. There is no conflict, and the case presents no question of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940